

Eastern District of Kentucky
FILED

OCT - 7 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

AT LEXINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

THE COMMONWEALTH OF KENTUCKY,)
)

Plaintiff,)

v.)

SANITATION DISTRICT NUMBER 1)
OF NORTHERN KENTUCKY)

Defendant.)

Civil Action No. *05-199-WMB*

UNITED STATES OF AMERICA,)
)

Plaintiff-Intervener)

v.)

SANITATION DISTRICT NUMBER 1)
OF NORTHERN KENTUCKY)

Defendant.)

COMPLAINT IN INTERVENTION

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), hereby files this complaint in intervention and alleges as follows:

NATURE OF ACTION

1. This is a civil action for penalties and injunctive relief brought under Section 309 of the Clean Water Act ("the Act"), 33 U.S.C. § 1319, against Defendant Sanitation District Number 1 of Northern Kentucky ("District") for discharges of pollutants in violation of Section 301 of the Act, 33 U.S.C. § 1311, including violation of conditions established in the National Pollutant Discharge Elimination System ("NPDES") permits issued to the District by the Kentucky Department of Environmental Protection ("KDEP"), pursuant to authority delegated to it by EPA under Section 402(b) of the Act, 33 U.S.C. § 1342(b), and for discharges of pollutants without an NPDES permit.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395(a), and Section 309(b) of the Act, 33 U.S.C. § 1319(b).

4. The Commonwealth of Kentucky ("Commonwealth"), in which the District is located, acting by and through its Environmental and Public Protection Cabinet, has filed this action as a party plaintiff. Authority to intervene as a matter of right in this citizens suit brought pursuant to Section 505(a) of the Act, 33 U.S.C. § 1365(a), is vested in the United States pursuant to Section 505(c)(2) of the Act, 33 U.S.C. § 1365(c)(2).

PARTIES

5. Plaintiff-Intervener United States of America has authority to bring this action on behalf of the Administrator of EPA ("Administrator") under Section 506 of the Act, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

6. Defendant District is a political subdivision of the Commonwealth established under the laws of the Commonwealth, KRS Chapter 220, and is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and a "municipality" within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

7. Defendant District is responsible for the operation and maintenance of wastewater treatment facilities and the sanitary sewer and stormwater drainage system serving residential, commercial and industrial entities throughout Boone, Kenton, and Campbell Counties in northern Kentucky.

GENERAL ALLEGATIONS

8. At all times relevant herein, the District has owned or operated wastewater treatment plants ("WWTPs") and their associated sanitary sewer and combined sanitary sewer - storm sewer ("combined sewer") collection systems, which receive and treat wastewater and storm water runoff from residential, commercial, industrial and combined sewage sources located within the Boone, Kenton, and Campbell Counties in northern Kentucky, and which discharge treated, partially treated, and untreated wastewater into the Ohio River and its tributaries.

9. The Ohio River and its tributaries are "navigable waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

10. Plaintiff Commonwealth has been authorized by EPA to administer the NPDES program within its jurisdiction pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), and to issue NPDES permits authorizing the discharge of pollutants directly into navigable waters of the United States in compliance with the applicable requirements of Section 301 of the Act, 33

U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the Act.

11. Under its authority to issue NPDES permits, the Commonwealth, through KDEP, has issued permits to the District under the Kentucky Pollutant Discharge Elimination System (“KPDES”) for each of the nine WWTPs operated and maintained by the District, authorizing the discharge of pollutants, within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12), in accordance with effluent limitations, monitoring requirements, and other conditions set forth in each KPDES permit. Each KPDES permit has been in effect at all times relevant to this Complaint.

12. Only one of the KPDES permits issued to the District, permit no. KY0021466 issued for the Dry Creek WWTP, authorizes the discharge of pollutants from point sources other than a WWTP post-treatment outfall, those point sources being the seventy four combined sewer overflow (“CSO”) points specified in that permit.

13. At all times relevant to this Complaint, the District has violated, and continues to violate, Section 301 of the Act, 33 U.S.C. § 1311, by failing to meet the conditions contained in the KPDES permits, and by discharging pollutants without an NPDES/KPDES permit.

FIRST CLAIM FOR RELIEF:
UNPERMITTED DISCHARGES FROM SANITARY SEWER SYSTEM
AND COMBINED SEWER SYSTEM

14. Paragraphs 1 through 13 are realleged and incorporated herein by reference.

15. On numerous occasions starting on at least January 1, 2000, and continuing through the date of this Complaint, the District has discharged into the Ohio River and/or its tributaries untreated sewage from discharge points within its sanitary sewer system and

combined sewer system which were not and are not authorized by any KPDES or NPDES permit.

16. Each of the discharges referred to in Paragraph 15 involved a discharge of pollutants from a point source into navigable waters of the United States, within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, without a NPDES or KPDES permit or other exception specified in Section 301(a) of the Act, 33 U.S.C. § 1311(a), in violation of Section 301 of the Act, 33 U.S.C. § 1311.

17. Each discharge event referred to in Paragraph 15 constitutes a separate violation of Section 301 of the Act, 33 U.S.C. § 1311.

18. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to \$27,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311 occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to \$32,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311, occurring on or after March 16, 2004.

19. Unless restrained by an order of the Court, the District will continue to violate Section 301 of the Act, 33 U.S.C. § 1311, by discharging untreated sewage from unpermitted discharge points within its sanitary sewer system and combined sewer system into the Ohio River and/or its tributaries.

SECOND CLAIM FOR RELIEF:
FAILURE TO COMPLY WITH STANDARD PERMIT CONDITIONS -
PROPER OPERATION AND MAINTENANCE

20. Paragraphs 1 through 19 are realleged and incorporated herein by reference.

21. On numerous occasions from at least January 1, 2000 through the date of this Complaint, in addition to the discharges referred to in Paragraph 15, the District has allowed spills of untreated sewage to occur from various points within its sanitary sewer system that did not reach navigable waters of the United States.

22. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with 401 KAR 5:065 Section 1(5), which is incorporated by reference as a standard permit condition in Part II of each KPDES permit issued by KDEP to the District as set forth in Paragraph 11, by failing to properly operate and maintain all of its permitted facilities, and systems of treatment and control and related appurtenances which are installed or used by the District, to achieve compliance with the conditions of the permits, as evidenced, in part, by the discharges and spills referred to in Paragraphs 15 and 21.

23. Each failure by the District to comply with the operation and maintenance provisions of the KPDES permits issued to it as set forth in Paragraph 22 constitutes a separate violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

24. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to \$27,500 per day for each violation of Sections 301 and 402 of the Act, 33

U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to \$32,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

25. Unless restrained by an order of the Court, the District will continue to violate Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, by failing to properly operate and maintain all of its permitted facilities, and systems of treatment and control and related appurtenances which are installed or used by the District, to achieve compliance with the conditions of the permits.

THIRD CLAIM FOR RELIEF:
FAILURE TO COMPLY WITH STANDARD PERMIT CONDITIONS -
BYPASS PROHIBITION

26. Paragraphs 1 through 25 are realleged and incorporated herein by reference.

27. On at least 30 separate occasions after January 1, 2000, the District intentionally diverted sewage or waste-streams containing pollutants from a portion of its WWTPs, each such diversion constituting a “bypass” within the meaning of 401 KAR 5:002(36).

28. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with 401 KAR 5:065 Section 1(13)(c), which is incorporated by reference as a standard permit condition in Part II of each KPDES permit issued by KDEP to the District as set forth in Paragraph 11, by allowing bypasses, as described in Paragraph 27, that were not excepted from the bypass prohibition of 401 KAR 5:065 section 1(13)(c).

29. Each failure by the District to comply with the bypass prohibitions of the KPDES permits issued to it as set forth in Paragraph 11 constitutes a separate violation of Sections 301 and 402 of the Act, 33 U.S.C. § 1311 and 1342.

30. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to \$27,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to \$32,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

31. Unless restrained by an order of the Court, the District will continue to violate Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, by allowing bypasses that are not excepted from the bypass prohibition of 401 KAR 5:065(13)(c).

FOURTH CLAIM FOR RELIEF:
FAILURE TO COMPLY WITH CSO PERMIT CONDITIONS

32. Paragraphs 1 through 31 are realleged and incorporated herein by reference.

33. On at least 87 separate occasions from January 2000 through the date of this Complaint, the District allowed the discharge of untreated sewage mixed with storm water from permitted CSO discharge points within its combined sewer system into the Ohio River and/or its tributaries during dry weather.

34. From at least January 1, 2000 and continuing through the date of this Complaint, the District failed to comply with permit condition B.5 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek

WWTP by failing to have in place adequate mechanisms and specific procedures to prevent CSOs during dry weather.

35. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.1 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure proper operation and regular maintenance programs for the sewer systems and the CSOs, as evidenced, in part, by the discharges referred to in Paragraphs 15, 21 and 33.

36. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.2 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure the maximum use of the combined sewer collection system for storage of combined sewage.

37. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.4 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure the maximization of sewage flow to the WWTP.

38. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.6 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure the control of solid and floatable materials at all permitted CSO discharge points.

39. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.8 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure that the public receives adequate notification of CSO occurrences and CSO impacts.

40. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.9 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures for monitoring CSOs to characterize CSO impacts and the effectiveness of CSO controls.

41. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit conditions B.11 and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to implement a long term CSO control plan, as required by Section 402(q) of the Act, 33 U.S.C. § 1342(q), and EPA's CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994), that includes mechanisms to ensure the evaluation and prioritization of long term alternatives for CSO remedial measures and an implementation schedule for such measures.

42. Each failure of the District to comply with permit conditions B.1, B.2, B.4, B.5, B.6, B.8, B.9, B.11, and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP, as set forth in Paragraphs 34 through 41, constitutes a separate violation of Sections 301(a) and 402 of the Act, 33 U.S.C. § 1311(a) and 1342.

43. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to \$27,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to \$32,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

44. Unless restrained by an order of the Court, the District will continue to violate Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342, by failing to comply with permit conditions B.1, B.2, B.4, B.5, B.6, B.8, B.9, B.11, and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP.

FIFTH CLAIM FOR RELIEF:
FAILURE TO COMPLY WITH PERMIT EFFLUENT LIMITATIONS

45. Paragraphs 1 through 44 are realleged and incorporated herein by reference.

46. On at least 230 separate occasions from January 2000 through the date of this complaint, the District allowed discharges of effluent from permitted outfalls into the Ohio River and/or its tributaries that did not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District for its WWTPs as described in Paragraph 11 of this Complaint.

47. Each event of discharge of effluent from permitted outfalls that did not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District, as set forth in Paragraph 46, constitutes a separate violation of Sections 301(a) and 402 of the Act, 33 U.S.C. § 1311(a) and 1342, on the part of The District.

48. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to \$27,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to \$32,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

49. Unless restrained by an order of the Court, the District will continue to violate Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342, by allowing discharges of effluent from permitted outfalls into the Ohio River and/or its tributaries that do not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District for its WWTPs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States of America requests that the Court enter judgment on behalf of the United States against the Defendants as follows:

a. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), order the District to undertake a program to achieve permanent and consistent compliance with all terms and

conditions of its NPDES/KPDES permits for its sanitary sewer and combined sewer systems and at its WWTPs and with the requirements of the Clean Water Act and the regulations promulgated thereunder;

b. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), assess civil penalties against the District of up to \$27,500 per day for each violation of Sections 301 and/or 402 of the Act, 33 U.S.C. §§ 1311, 1342, as alleged in this Complaint, occurring on or after January 31, 1997, but before March 16, 2004; and up to \$32,500 per day for each violation of Sections 301 and/or 402 of the Act, 33 U.S.C. §§ 1311, 1342, as alleged in this Complaint, occurring on or after March 16, 2004;

c. Award the United States its costs in the action; and

d. Grant the United States such other relief as the Court deems appropriate .

Respectfully submitted,

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